UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WALT DISNEY PARKS AND RESORTS U.S.
d/b/a WALT DISNEY WORLD CO.

Employer

and Case 12-UC-203052

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 385

Petitioner
_____ /

RESPONDENT WALT DISNEY PARKS & RESORTS U.S.'
REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
DECISION AND ORDER DATED MAY 8, 2018

Respectfully submitted,

By: /s/ Andrew S. Hament

Andrew S. Hament
Florida Bar No. 325279
Email: ahament@fordharrison.com
Aaron L. Zandy
Florida Bar No. 0125271
Email: azandy@fordharrison.com
Bret C. Yaw
Florida Bar No. 0100445
Email: byaw@fordharrison.com

FORD & HARRISON LLP
300 South Orange Avenue, Suite 1300
Orlando, FL 32801
(407) 418-2300 Telephone
(407) 418-2327 Facsimile

Attorneys for Walt Disney Parks & Resorts U.S.

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RESPONDENT WALT DISNEY PARKS & RESORTS U.S.'
REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S
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This case involves a Unit Clarification Petition ("Petition") filed by the International Brotherhood of Teamsters, Local 385 ("Union"), seeking to include Ride Service Associates ("RSAs") employed by Walt Disney Parks and Resorts U.S. ("Employer") into an existing bargaining unit, consisting *inter alia* of commercially-licensed bus drivers, without an election. In granting the Petition, the Regional Director erroneously finds that an RSA – a Lyft-type driver who provides individualized, on-demand transportation and guide services to guests in non-commercial vehicles – is the functional equivalent of a commercial bus driver running a fixed route for a mass of people.

In the Regional Director's Decision and Order Clarifying Bargaining Units (the "Decision"), the Regional Director essentially rewrites the Parties' Collective Bargaining Agreement ("CBA" or "Contract"), which would otherwise bar the Petition. He then misapplies this Board's *Premcor*[1] doctrine, concluding that a commercial bus driver performs the same job duties as an on-demand, personalized guide who operates a car using a Lyft application. The Regional Director, in effect, absurdly finds that a commercial bus driver is the functional equivalent of a Lyft or Uber driver. The Regional Director's Decision raises substantial questions of law and policy and reflects a significant departure from established Board precedent. It warrants a review by the Board.

First, despite an express disclaimer of interest, which has existed between the Parties for more than 40 years, the Regional Director, without any evidence or supporting law, concluded that this disclaimer is inapplicable to job classifications created during the Contract's term. This is

[1] *Premcor, Inc.*, 333 NLRB 1365 (2001).

incorrect and in derogation of the Contract's plain language and undisputed evidence. The main function of a disclaimer of interest is to provide the Parties with certainty during the terms of the Contract as to who is covered by the agreement. This serves labor stability, which is the purpose of the Act. Very simply, the Board should hold the Union to its negotiated promise.

Second, the *Premcor* doctrine does not – and should not – apply to the instant matter. RSAs, a newly-created job classification, provide a unique new service that the Employer never offered before. In providing this service, RSAs perform different job functions than bargaining unit employees: they interact with guests in different ways, they operate different vehicles, they operate different routes, they respond to individual guest-initiated services requests, and they have different qualifications, skills, and training. Yet despite these differences, the Regional Director failed to compare the functions performed by RSAs and bargaining unit employees and instead concluded that application of *Premcor* was appropriate because both positions involved "the transportation of guests between lodging and attraction locations within the confines of [the Employer]." This is a convenient oversimplification. Applying the Regional Director's logic, every passenger-driver is the same. This would mean a Greyhound bus driver performs the same functions as a limo chauffer, which is nonsensical. The *Premcor* doctrine is simply inapplicable in the context of this case.

Third, if the Regional Director had applied the Board's accretion analysis, the result of this matter would without a doubt be different. The Union failed to satisfy the Board's "restrictive standard" required to demonstrate a valid accretion. Indeed, the Union's only evidence was offered through self-serving, second-hand testimony of an individual who has never worked in the positions about which he testified and even that testimony was plainly insufficient to satisfy the Union's heavy burden required to prove accretion. To the contrary, the community of interest factors heavily weigh against a finding of accretion.

Finally, the Regional Director's Decision results in the disenfranchisement of at least 74 Cast Members[2], who have been forced into a bargaining unit without an election or any determination as to whether this is their will. The Board should not permit this to occur.

I. BACKGROUND & GROUNDS FOR REVIEW

The Employer is a vacation destination, offering entertainment, resorts, theme parks, merchandise and restaurants. (Tr. 21:1-3.)[3] Utilizing the Lyft mobile phone application, the Employer had the concept to offer its guests an individualized, point-to-point ride service, operated by drivers serving as a personalized guide during the ride. (Tr. 45: 17-25, 46:1-3, 51:15-21.) The Employer had never previously provided this service to its guests. (Tr. 81:4-6.) The Employer created the RSA job classification in conjunction with this service, which the Employer called "Minnie Vans" (Tr. 45:10-16, 46:4-8.) The RSA position is not listed within the unit recognition articles in the Employer's collective bargaining agreements. (Tr. 46:9-11, Co. Exs. 7, 8.)

This case came before the Board on a Petition filed by the Union to accrete the RSAs into the existing bargaining unit, which includes *inter alia* commercial bus drivers. An evidentiary hearing was held on November 16, 2017, before an NLRB Hearing Officer. At the commencement of the hearing, the Hearing Officer stated that "the Regional Director has directed that the following issue will be litigated in this proceeding: whether or not the ride service associates...[a]ccretes to the existing bargaining unit ….)." (Tr. 17:24-25, 18:1-6.)

During the hearing, the Employer presented evidence that the Contract contained a disclaimer of interest, wherein the Service Trades Council Union ("STCU"), of which the Union is an affiliate, explicitly waived the right to represent Cast Members working in job classifications

[2] The Employer refers to its employees as "Cast Members."

[3] References to the hearing transcript is cited to as "Tr." followed by the page number and then the line numbers.

not listed in Addendum A to the CBA. The Employer further presented evidence regarding the creation of new job classifications, and how the disclaimer of interest operated in the past. Finally, the Employer presented evidence that RSAs do not share an overwhelming community of interest with the existing bargaining unit. RSAs have different supervision, different terms and conditions of employment, provide a different service, use different vehicles, report to work in a separate geographic location, receive their job assignments in a different manner, and have no interchange whatsoever with bargaining unit employees. As the Employer's evidence demonstrates, there is a dramatic difference between RSAs, who are summoned on-demand to provide point-to-point transportation, and bargaining unit employees, who operate on a specific route to pick-up guests at fixed stops. The Union failed to demonstrate any community of interest between RSAs and bargaining unit employees, let alone an overwhelming community of interest. Despite the express disclaimer of interest, as well as the facts weighing against a finding of accretion, the Regional Director issued a Decision on May 8, 2018, clarifying the existing bargaining unit to include RSAs. The Regional Director disagreed that the disclaimer of interest applied to newly created job classifications. Ignoring both his own and the Union's framing of the issue, he then failed to base his decision on the Board's accretion factors. Instead, the Regional Director relied upon the *Premcor* doctrine to find the RSAs to be automatically included within the bargaining unit.

The Board grants review of Regional Director actions where, among other reasons: (1) a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent; (2) the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party. *See* NLRB Rules and Regulations § 102.67(d). The Employer requests the Board's review of the

Decision on the grounds that: (1) the Regional Director failed to adhere to the *Briggs Indiana*[4] doctrine and find that the Union disclaimed interest in newly-created job classifications; (2) applying the *Premcor* doctrine in this case is a dramatic departure from Board precedent; (3) had the Regional Director applied the accretion analysis, RSAs would not be accreted into the Union; and (4) the Decision effectively disenfranchises RSAs.

II. FACTS

A. The Parties' CBA

In 1972, the Employer voluntarily recognized the STCU, which contains six-member affiliates including the Union. (Tr. 23:5-19, Co. Ex. 1.) In exchange for voluntary recognition, the STCU (and its affiliates and respective internationals) promised that it would not seek to represent the Employer's Cast Members, now or in the future, except for those specifically identified on a list. (Tr. 25:5-20.) The Contract is bargained with the STCU, and then each affiliate negotiates addenda with regard to the positions that the affiliate represents. (Tr. 23:20-25, 24:1.) The Union has two addendums; one covers all the characters and character attendants employed by the Employer; the other covers bus drivers, textiles, ranching, and parking employees. (Tr. 24:2-7.) The STCU represents approximately 38,000 Cast Members – 24,000 full-time and 14,000 part-time; the Union represents approximately 4,600 Cast Members. (Tr. 24:8-25.)

Addendum A of the Contract contains a list of all of the positions the STCU represents. The Contract's Recognition article states that:

> The Employer recognizes the Service Trades Council Union as the sole and exclusive collective bargaining representative of all of the Employer's Regular Full Time employees who are in the classification of work listed in Addendum A at Walt Disney World Resort in Bay Lake, Florida, but excluded are all other employees, Security and Supervisors as defined in the Labor Management Relations Act of 1947, as amended.

[4] As restated in *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959).

(Co. Ex. 7.)

The Contract contains a disclaimer of interest that states that the STCU and its affiliates will not seek to represent employees if they are not listed on a specified addendum. (Tr. 28:13-17, Co. Exs. 7, 8.) This language was included within each of the Parties' contracts over the past 40 years. (Tr. 25:21-25, 26:1, Co. Exs. 2, 3.) The disclaimer, located in Article 4, Section 2, states:

> The Service Trades Council Union and its individual international and local Unions disclaim any interest now, or in the future, in seeking to represent any employees including the Animal Keeper classifications of the Employer other than those in the classifications set forth in Addendum A, except as to the classification described in Case No. 12 RC 451, affirmed 215 NLRB No. 89.

(Co. Ex. 7.)

B. Enforcement of the Disclaimer

The Employer has previously applied and enforced this disclaimer of interest. (Tr. 28:18-20.) An STCU affiliate, the United Food and Commercial Workers, Local 1625 ("UFCW") attempted to organize the Employer's reservation sales agents and filed two representation petitions with the Board. (Tr. 30:2-23, Co. Ex. 4.) In response, the Employer asserted that based on the disclaimer in the Contract, the UFCW had no right to organize these employees, as they are not contained in Addendum A. (Tr. 30:8-12, Co. Ex. 4.) It was the Employer's understanding that the UFCW withdrew the petitions because they would be dismissed. (Tr. 30:24-25, 31:1-3.) The UFCW filed a representation petition seeking to represent the Employer's registered nurses who work in guest first aid. (Tr. 32:22-25, 33:1-3, Co. Ex. 5.) The Employer took the position that the disclaimer banned UFCW from seeking to represent these individuals, as they are not contained in Addendum A. (Tr. 33:4-6.) Again, it was the Employer's understanding that the UFCW withdrew this position based on a pending dismissal. (Tr. 33:7-8, Co. Ex. 5.)

The UFCW filed a unit clarification petition seeking to represent Cast Members who work in the Employer's Company D locations. (Tr. 34:22-25, 35:1-5, Co. Ex. 6.) The Employer

responded that as the Company D Cast Members are not covered by Addendum A, the UFCW was prohibited from seeking representation based on the Contract's disclaimer and it was the Employer's understanding that the petition was withdrawn pending dismissal. (Tr. 35:7-13, Co. Ex. 6.)

Each of these petitions sought to represent job classifications that were in existence during a term of the existing Contract; that is, they were not newly-created. Before now, the Employer has not had an occasion to apply and enforce this language in response to a proceeding before the Board involving a newly-created job position. The Employer did, however, successfully assert the disclaimer of interest in response to a grievance filed by an STCU-affiliate, which claimed a newly-created job classification was covered under the Contract. (Tr. 36:12-25, 37:1-25, 38:1-5.) It is undisputed that after the Employer raised this disclaimer of interest and that the grievance was denied by the Joint Standing Committee, the two-member committee comprised of representatives from the Employer and the STCU. *Id.*

As discussed below, and as found by the Regional Director (Decision at p. 5), the evidence shows that that newly created job classifications have only been added to the bargaining agreement by "mutual agreement."

C. How the Employer Creates New Job Classifications

When the Employer creates a new job classification, the Employer first analyzes the need for the work to be performed and the need for the position. (Tr. 40:16-25.) The Employer opens new positions frequently. *Id.* When the Employer believes that a position is encompassed in the Contract, it approaches the STCU, who then determines which affiliate will represent the position. (Tr. 43:8-15.) If the position is performing work within the jurisdiction of the Contract, the Employer applies Article 12, Section 2 to determine what the Employer believes is an appropriate rate of pay. (Tr. 42:1-8, 43:1-4.) Article 12, Section 2 is entitled "Rates for New Jobs" and states:

> If the Employer hereafter establishes any new or substantially changed job classification or work operation, prior to the implementation of any new or substantially changed job classification or work operation, the Employer will discuss such action with the Union. The new job classification and wage rate for such new job classification will be established by the Employer. If the Union does not agree with the rate for the job classification, the Union shall submit a written grievance at the Step 2 of the Grievance Procedure within fourteen (14) calendar days after installation of the new rate. In the event any higher rate is agreed upon through the Grievance Procedure or arbitration, it shall be effective retroactively as of the date of the job classification was installed.

(Co. Ex. 7.) Article 12, Section 2 has no impact on Article 4, Section 2 (the disclaimer of interest). That is, the only time Article 12, Section 2 is applied is when the Employer and the STCU agree a job classification is covered by the Contract. (Tr. 42:1-8, 43:1-4.) Once an appropriate wage rate is determined in accordance with Article 12, Section 2, the job classification is added to Addendum A. (Tr. 43:5-25, 44:1-4.) This process only applies to unit positions. (Co. Ex. 7.) There has never been an instance where a new job classification has been added to the CBA without mutual agreement of the Employer and the STCU. (Tr. 44:5-9.)[5] In fact, an STCU-affiliate rejected inclusion of a certain job classification in the Contract, believing that the work performed was not within the purview of the Contract. (Tr. 44:10-24.) As a result, this job classification was not included in the Contract. (Tr. 44:25, 45:1.)

D. RSAs[6]

The Employer created the RSA position in conjunction with the formation of the Minnie Van program, which occurred in March 2017. (Tr. 46:4-8, 80:15-20.) The Employer never

[5] Notably, Article 12, Section 2 only requires the Employer to discuss a new classification with the STCU before implementation for the purpose of setting a pay rate. (Co. Ex. 7.) It does not require that the STCU agree, consent, or otherwise approve of the creation of the new job classification in the first place. *Id.* This is wholly consistent with the plain language of the disclaimer of interest, as well as the process by which the Employer creates new job classifications. *See Ingham Reg'l Med. Ctr.*, 342 NLRB 1259, 1262 (2004) (specifically declining "to find the words 'bargain' and 'discuss' to be synonymous."); *see also Omaha World-Herald*, 357 NLRB. 1870, 1871 (2011) (finding that "[i]t is surely significant that the parties chose the terms 'discuss' and explain' rather than 'bargain over[,]'" because "had the parties intended to convey a bargaining obligation…they likely would have used the term 'bargain,' as they did elsewhere in the agreement.").

[6] The Employer will provide more in-depth information about RSAs' terms and conditions of employment in its analysis of the accretion factors, which contrast those terms and conditions with those of Bus Drivers.

previously offered this service to guests. (Tr. 81:4-6.) And, obviously, there was no position entitled "RSA" ever before during the history of the collective bargaining agreement. (Tr. 46:9-11.) The Minnie Van program is a service which offers personalized point-to-point travel for guests, with travel being on "demand," and the points selected by the guests. (Tr. 45:11-22, 101:16-18.) This is an individualized service for guests, and the RSA engages them in conversation about their experiences, as well as answers any questions they may have. (Tr. 50:25, 51:1-21.) The cost for this service is a flat rate of $20. (Tr. 51:15-25.)

RSAs utilize the Lyft application, but are not employed by Lyft. (Tr. 50:15-16.)[7] If a guest wants to utilize the Minnie Van service, the guest initiates the service by using the Lyft app which alerts an RSA. (Tr. 83:4-12.) There are no advance reservations; instead, the app finds an appropriate RSA and assigns that RSA to the guest's location. (Tr. 85:2-19.) It is an impromptu, on-demand service. (Tr. 101:12-18.) RSAs do not work any fixed routes; they are at the guests' command. (Tr. 53:16-19.) For example, if requested by the guest, the RSA will stop at a gas station to allow the guest to purchase a lottery ticket. (Tr. 51:15-21.) RSAs use their own judgment to decide what they will do between rides. (Tr. 89:8-10.) The Employer employs 74 RSAs, only three of whom the Employer had previously employed as a Bus Driver. (Tr. 72:1-3.)[8]

RSAs are not trained to drive and are not required to have a commercial driving license ("CDL"), as they operate non-commercial vehicles (minivans and sport-utility vehicles). (Tr. 51:11, 53:20-22.) These vehicles have a maximum capacity of up to eight passengers. (Co. Ex. 9.)

[7] Lyft is an on-demand transportation company. Users download an app to their mobile phone and, when utilized, connects passengers with available drivers.

[8] During the hearing, the Employer explained that its Minnie Van program was being offered at that time on a "pilot basis." (Tr. 45:17-20.) That is, it was only offered to certain guests staying at certain resorts. *Id.* During a "pilot program", the Employer evaluates feasibility of a new type of service. (Tr. 49:7-15.) If the Minnie Van pilot is successful, the Employer anticipated moving the program to all 18 of its resorts, as well as to all of its day guests. (Tr. 49:20-25, 50:1-8.) If the pilot program is successful, the Employer expects the number of RSAs to increase into the hundreds. (Tr. 49:16-24.)

RSAs transport individuals or small cohesive groups of guests. (Tr. 85:24-25, 86:1-7, Co. Ex. 9.) RSAs are responsible for maintaining the cleanliness of their vehicles during their shift. (Tr. 101:19-20, Co. Ex. 9.) Instead, RSAs receive training on how to interact with guests through storytelling and guest engagement. (Tr. 54:1-3.) RSAs receive this training through the completion of in-car role-play scenarios, wherein the trainer will bring up any number of guest situations and train the RSA on how to react to that situation. (Tr. 54:3-8.) RSAs are also trained about the events occurring on the Employer's property, as well as to listen and engage guests on topics in which the guests are interested. (Tr. 54:14-25, 55:1.) The RSAs training is constantly ongoing because new events and changes to property occur regularly. This requires RSAs to have knowledge of the entire property and the Employer expects RSAs to be able to answer guest questions about the property. (Tr. 100:13-21.) For example, if the Minnie Van passes Cirque du Soleil, the RSA will be able to provide the times at which the guest can see the show. (Tr. 99:10-23.)[9] In so doing, the RSA provides enhanced and individualized guest service, much like a VIP tour guide. (Tr. 55:1-3, Co. Exs. 9, 10.)[10] Initial RSA training is approximately two weeks in length. (Tr. 96:23-25, 1-3, 97:18-21.)

RSAs are also empowered to engage in what is known as "guest recovery" to attempt to make a guest's experience more magical and can do so without managerial approval. (Tr. 114:8-23.) This is a requirement of the position that is not shared by Bus Drivers. (Tr. 68:19-25, 69:1-6.) For example, if in conversation, a guest shares his or her disappointment that a restaurant did not

[9] Upon eliciting this testimony from Christie Sutherland, Director of Labor Relations, the Hearing Officer remarked, "Wow. Knowledgeable." (Tr. 99:19-23.)

[10] The Employer's VIP tour guide is high-impact position that provides guests with a VIP guide experience. (Tr. 56:5-25, 57:1-2.) As a part of that experience, the VIP tour guide provides guest transportation across the Employer's property including to specific attractions or shows. *Id*. VIP tour guides operate non-commercial vehicles (e.g., sedans, minivans, SUVs) and are not required to have a CDL. (Tr. 57:3-22.) They do not operate busses. *Id.* The Employer employs 80 to 90 VIP tour guides who are not represented by the Union or any STCU-affiliate. (Tr. 58:1-4.)

have an item on the dessert menu, the RSA may phone the resort at which the guest is staying and arrange for the desert to be brought to the guest. (Tr. 114:2-7.)

E. Bus Drivers[11]

Bus Drivers perform work covered by the Contract and the classification is included in Addendum A. (Tr. 67:6-12, Co. Ex. 7.) The Union represents this position, in which approximately 1,750 Cast Members work. (Tr. 67:13-14, 160:3-6.) The Bus Drivers' primary function is the safe operation of a bus. (Tr. 68:6-8.) Bus Drivers must have a CDL. (Co. Ex. 13.) Bus Drivers operate their vehicle on an assigned route, whether there are passengers or not, stopping at stops until the route is completed. (Tr. 67:19-25.) Once the route is completed, the driver either completes the route again or is dispatched to another route assignment. (Tr. 68:1-3.) Bus Drivers do not deviate from their assigned routes. (Tr. 68: 1-4.)

Although Bus Drivers interact with guests, it is not a primary function of their jobs, nor are they provided with any training on how to engage guests. (Tr. 68:5-18.) In fact, Bus Drivers play pre-recorded audio taped information over the bus's public address system while carrying passengers to the next pre-determined destination on the route. (Tr. 64:19-25, 65:1-10.) When Bus Drivers do speak with guests, they do so through a set of pre-memorized speeches, not individualized conversations. (Tr. 64:19-25, 65:1-10, 121:6-18, Co. Ex. 13.) Bus Drivers do not actively engage in guest recovery; instead, for example, a Bus Driver may give a sticker to a crying child, or provide information about the individual to whom a guest should speak to about a concern. (Tr. 68:19-25, 69:1.) Bus Drivers are not responsible for maintenance of the buses that they drive; instead, this function is performed by a bus mechanic. (Tr. 115:2-6.)

[11] The Employer will provide more in-depth information about Bus Drivers' terms and conditions of employment in its analysis of the accretion factors, which contrast those terms and conditions with those of RSAs.

Bus Drivers' training is focused on the safe operation of buses, generally, as well as the Employer's buses. (Tr. 68:11-16.) The Employer offers a program for Bus Drivers to obtain a CDL license and requires all Bus Drivers to attend the Employer's CDL certification course. (Tr. 68:11-18.) Bus Drivers' training last fourteen consecutive weeks. (Co. Ex. 13.)

F. Parking Host/Hostesses

The Union also represents Parking Host/Hostesses ("PHHs"), which are Cast Members who direct traffic in the Employer's parking lots. (Tr. 155:2-22.) PHHs are included in Addendum A of the Contract. (Co. Ex. 7.) PHHs may, as a part of their overall responsibilities, be assigned to drive an open-air vehicle, i.e. a tram, to transport high volumes of guests from parking lots to parks, but do not regularly interact or speak with guests while driving. (Tr. 130:5-12, 156:19-25, 157:1-8.)[12] To the extent a PHH operates a vehicle, the PHH is only required to possess a driver's license and be able to interact with groups of guests. (Tr. 130:13-24.)

III. ARGUMENT

A. The Regional Director Should Have Followed the *Briggs Indiana* Doctrine

The Contract language at issue in this case is clear and unambiguous. The disclaimer makes no exception for newly-created job classifications. If a job classification is not listed in Appendix A of the Parties' Contract, the Union disclaimed any interest in that job classification, without exception. Instead of honoring and enforcing the Union's promise, the Regional Director declined to apply *Briggs Indiana* and found that the Contract failed to "satisfy the strict 'clear, knowing,

[12] The Union continuously referred to PHHs that drive guests from parking lots to parks as "tram drivers." (e.g. Tr. 130:5-25, 131:1-2.) There is no such job classification in the Contract and further, those PHHs that drive trams must possess the same qualifications as those PHHs that do not drive trams. (Tr. 154:24-25, 155:1, 156:15-25, 157:1-8.)

and unmistakable' standard for finding that the Union waived its right to represent employees" in newly-created positions.

To reach this conclusion, the Regional Director found that the Contract is silent on job classifications not yet in existence at the time the Contract was executed. The Regional Director then read Article 4, Section 2 "in harmony" with Article 12, Section 2. In doing so, the Regional Director found that this could "only be interpreted to mean that the parties contemplated that new job classifications may be added to the full-time and part-time unit." The Regional Director utilized the Parties' collective bargaining history to bolster these conclusions, noting that the number of job classifications represented by the Union has increased from 29 positions with the first Contract in 1972 to 130 positions today. The Regional Director's conclusion, however, ignores the plain language of the Contract, as well as the undisputed evidence regarding how the Employer creates new job classifications.

As restated by the Board in *Cessna Aircraft Co.*, 123 NLRB 855, 857 (1959), the *Briggs Indiana* doctrine is applicable where "[a] union which agrees by contract not to represent certain categories of employees during the term of a collective-bargaining agreement may not during that period seek their representation." The Board continued, finding that "this rule will be applied only where the contract itself contains an *express* promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership." *Id.* (emphasis in original). This principle "rests on the notion that a party should be held to its express promise." *Lexington Health Care Grp., LLC*, 328 NLRB 894, 896 (1999). "If there is such a promise, we <u>will</u> enforce it, for a party ought to be bound by its promise." *Id.* (emphasis supplied). This rule makes perfect sense as it allows the parties to maintain harmony and avoid disruptions and disputes over representation issues during the term of the collective bargaining agreement.

Article 4, Section 2 of the Parties' Contract states that:

> The Service Trades Council Union and its individual international and local Unions disclaim any interest now, or in the future, in seeking to represent any employees including the Animal Keeper classification of the Employer other than those in the classifications set forth in Addendum A, except as to the classification described in Case No. 12 RC 4531, affirmed 215 NLRB No. 89.

(Co. Ex. 7.) Despite this clear and unambiguous language, the Regional Director asserts that this waiver is inapplicable to the instant matter, which has the practical effect of rewriting the parties' CBA and finding that the Union is not bound by its express promise.

The Union promised it would not represent any Cast Members other than those working in job classifications contained in Addendum A to the Contract. There is no exception for newly-created job classifications; either the job classification is contained in Addendum A, or it is not. The Decision, however re-writes the Contract to exclude newly created job classifications from the plainly worded disclaimer and force RSAs into the bargaining unit.

In addition, the Decision ignores the undisputed evidence of how the Employer creates new job classifications. That is, the Regional Director erred in construing the Union's disclaimer of interest with how the Parties determine a wage rate for a new position. Article 12, Section 2 only requires the Employer to "discuss" a new classification with the STCU before implementation. (Co. Ex. 7.) It does not require that the parties negotiate or agree to a new job bargaining unit classification. (See footnote 5, *supra*, and cases cited therein distinguishing the use of the word "discuss" from a bargaining obligation.) This is consistent with the Parties' past practice. It is undisputed that the only manner in which a new position has been included in the Contract is through mutual agreement. Article 12, Section 2 only applies if the Parties mutually agree that a new position is covered by the Contract such that it is included in Addendum A. There is no evidence that the Parties agreed to place the RSA in the bargaining unit. Accordingly, the disclaimer of interest applies.

The Union expressly disclaimed interest in representing employees who are not contained in Addendum A. Whether such representation occurs through a representation election or an accretion determination, the Union plain and simple promised to disclaim interest in any position not contained within Addendum A. It is undisputed that RSA is not included within Addendum A. (Co. Ex. 7.) Accordingly, the Regional Director erred when he concluded that this express disclaimer does not apply to newly created job classifications. This rewrites the Parties' CBA and reflects a significant departure from established Board precedent.

The Regional Director's conclusion is illogical, as well. By definition, a new position cannot be addressed by an existing contract. Following the Regional Director's logic, parties to a contract can never disclaim interest, ever, over such a position. The Board's "clear and unmistakable" rule, however, does not require the parties to predict every conceivable scenario and then detail each in a collective bargaining agreement. As demonstrated here, the consequence of this logic has the effect of forcing the Parties into disruptive and protracted representation proceedings during the term of the CBA to litigate new positions. This does not serve labor stability and is the very thing the disclaimer of interest promise was intended to avoid. *See VFL Tech. Corp.*, 332 NLRB 1443, 1444 (2000) (stating that by giving effect to disclaimer of interest, the Board is "giving full expression to the Board's dual purposes of fostering labor relations stability and employee freedom of choice.")

B. The Regional Director Should Not Have Applied the *Premcor* Doctrine

The Regional Director further erred in applying the *Premcor* doctrine to determine that RSAs "perform the same basic functions of guest transportation within [the Employer's property]" that had been historically performed by Bus Drivers. In other words, according to the Regional Director, because RSAs operate a vehicle to transport guests around the Employer's property, they are the functional equivalent of a commercial bus driver. Such a conclusion is an

oversimplification of the analysis required by the *Premcor* doctrine and, thus, a departure from Board precedent.

In *Premcor,* the Board determined that a clarification, rather than an accretion, to a bargaining unit was appropriate where employees in a newly-created job classification "perform[ed] the same basic functions historically performed by the members of the bargaining unit." 333 NLRB at 1365. The facts of that case are very different from this one.

In *Premcor*, the employer operated an oil refinery and bargaining unit employees in the position of "Operator 1" had historically monitored and manipulated certain elements (flows, temperatures, pressures, etc.) to meet production levels. *Id*. The employer created a centralized control room, in which the monitoring and manipulation of the various elements would be performed through the use of computerized consoles. *Id.* The employer created the "PCC" position to operate these consoles and the individuals the employer hired were all formerly Operator 1s or employees known as "spares" who were trained to fill in as Operator 1s. *Id.* The Board found that both positions (Operator 1 and PCC) performed the same basic functions – monitoring and manipulating various elements for each refinery unit and maintaining communications with field employees. *Id.* at 1366. Accordingly, the Board concluded the bargaining unit should be clarified to include the PCCs. *Id.*

Here, the work in question is brand new and is being performed by a whole new set of employees. The Employer never offered the Minnie Van service until doing so in mid-2017. The Employer, therefore, created the RSA's job functions to meet the goals of the Minnie Van service. Accordingly, the functions of the RSA have NEVER been performed by anyone, including those in the bargaining unit. Indeed, the concept of an on-demand ride service and the technology to enable such a service did not exist until recently. It is impossible, therefore, for RSAs to perform

the same basic functions historically performed by bus drivers because the RSAs' functions were only recently created.

Several months later, the Board followed *Premcor* in *Developmental Disabilities Inc.*, 334 NLRB 1166 (2001), which is also easily distinguishable from this case. In that case, the employer provided educational and other services for developmentally disabled children and adults. The bargaining unit was defined as including all "instructional employees" and had historically included teachers and assistant teachers. *Id.* The employer created a new classification, therapy assistant/psychology, to provide one-on-one instruction to disruptive children. *Id.* at 1167. The Board found that this classification should be included within the existing bargaining unit because they performed the same basic work function of teaching mentally-disabled children to modify behavior to attain educational goals. *Id.* at 1168. The Board noted that "there is no evidence that these therapy assistants/psychology have been more intensively trained than the assistant teachers." *Id.* Finally, the new classification collected and recorded the same type of data as teachers and assistant teachers, had frequent contact with the psychology supervisor regarding the child's status, and had the same discretion as teachers in running their classrooms. *Id.* The only apparent difference between the therapy assistant/psychology and teacher and assistant teacher positions was the disruptive severity of the student. *Id.* Accordingly, the Board applied *Premcor* and found that the new classification was properly viewed as belonging in the unit. *Id.*

Interestingly, the Regional Director's Decision cites to but then, for some reason, fails to analyze and consider the instant case in light of the Board's more recent analysis of the *Premcor* doctrine in *AT Wall Co.*, 2014 NLRB LEXIS 758 (2014). In *AT Wall*, the Board considered and rejected the application of the *Premcor* doctrine. In that case, as here, an Acting Regional Director declined to apply the standard accretion analysis and instead found under *Premcor* that several new job classifications should be included in an existing unit because the new positions, like the

existing unit positions, are all basically "production and maintenance employees" who simply work on a different product line, albeit making a more complex product. In rejecting this reasoning, the Board considered the scope of the parties' collective bargaining agreement, which defined the unit to certain job descriptions, as well as the fact that the newly-created "employees' function of producing an entirely different product using different processes under different working conditions is not sufficiently related to the functions of employees in other departments." *Id.* at *14. Indeed, the new employees made "substantially different products, using different machinery and processes that require significantly different training." *Id.* at *16. The Board also found significant that the new employees did not displace any unit employees or perform their work. *Id.* at *16-17. Consistent with these findings, the Board rejected the Acting Regional Director's decision to apply *Premcor* and applied its standard accretion analysis. *Id.*

Recently, two Regional Directors reached the same conclusion. In *ADM Trucking, Inc.*, 2015 NLRB Reg. Dir. Dec. LEXIS 52 (2015), the Regional Director declined to find that all truck drivers are the same. The union sought to include five truck drivers operating from a terminal in Springfield, Illinois into an existing bargaining unit of 159 truck drivers, mechanics, and utility employees operating from Decatur, Illinois. *Id.* at *1. The Regional Director disagreed with the Union that *Premcor* applied, finding that although the Springfield employed local truck drivers, it did not have "any OTR, City, or Hybrid Drivers like the Decatur unit." *Id.* at *27-28. Additionally, although Springfield drivers "haul[ed] product in the same manner as Decatur drivers," the employer had truck drivers at other non-union facilities hauling product this way. Similarly, while Springfield drivers did not possess "any additional qualifications, skills, or training," than Decatur drivers, the same could be said for drivers at other non-union facilities. *Id.* at *28-29. The types of products that Springfield drivers hauled changed daily, and these drivers performed different routes than Decatur drivers. *Id.* at *28. The Regional Director distinguished *Developmental*

Disabilities, finding that not all of the Springfield drivers were hired from the Decatur unit and that only one employee had voluntarily transferred from that unit. *Id.* at 29. Finally, the Regional Director compared the matter to that in *AT Wall*, finding that the "collective bargaining agreement narrowly defines the unit to include" those employees employed at the Decatur location and "it specifically excludes all other of the [e]mployer's employees." *Id*. at *29-30. Accordingly, the Regional Director concluded that Springfield truck drivers did not perform the same basic work functions as those performed by the Decatur unit, declined to apply *Premcor*, and utilized the Board's traditional accretion analysis. *Id.*

In *Palo Alto Medical Foundation for Health Care, Research, and Education*, 2016 NLRB Reg. Dir. Dec. LEXIS 95 (2016), the Regional Director refused to find that all registered nurses ("RNs") are the same. The union sought clarification of an existing bargaining of RNs working in the employer's outpatient clinics to include RNs who worked at some of the employer's ambulatory surgery centers. The union argued that *Premcor* was appropriate as surgical center RNs "have duties as responsibilities that are fundamentally the same as those historically performed by bargaining unit employees." *Id.* at *22. The Regional Director disagreed, finding that the record established these RNs performed very different medical care, stating "surgery centers perform surgical procedures on patients, including patient preparation and recovery, while outpatient clinics are focused primarily on patient examinations and consultations." *Id*. at *23. The Regional Director distinguished these facts from *Premcor*, and applied the Board's accretion analysis. *Id.* at *23-24. Here, had the Regional Director performed a true comparison of job duties, as Board precedent dictates, the only conclusion that could be reached is that *Premcor* is inapplicable. *See Rape, Abuse & Incest Nat'l Network*, 2015 NLRB Reg. Dir. Dec. LEXIS 250, *27 (2015) (distinguishing *Premcor* on lack of "eliminate-and-replace" and finding "when there is a narrow unit description and the employees sought to be included in the unit perform different

work on a separate line, it is not appropriate to find that employees are included in the existing unit.").

The facts of this case are readily distinguishable from those in *Premcor*. The Contract contains a narrowly-defined unit (i.e. those classifications in Addendum A), in which the RSA is not included. RSAs perform different functions than bargaining unit employees, providing an on-demand, individualized service which the Employer never before offered. This service is initiated and paid for by the guest via the Lyft app. RSAs provide a unique, high-impact individualized guest experience which necessarily varies from guest to guest. RSAs utilize every-day type minivans and sport-utility vehicles and actively engage guests. Although RSAs provide guest transportation[13], they do so on an individualized, point-to-point basis without following a specified route. RSAs also undergo extensive training to develop the ability to interact with guests. Finally, RSAs are empowered to rectify negative guest experiences without managerial oversight; that is, the Employer trusts RSAs to identify opportunities to enhance guests' experiences, which may result in expenditures by the Employer.

On the other hand, Bus Drivers, who are included in Addendum A, operate a commercial bus, which requires a special license, and is free to guests. Bus Drivers are focused on the safe operation of their bus, not guest engagement. To wit, the Employer requires Bus Drivers to obtain a CDL certification and complete fourteen consecutive weeks of training, but provides no training on guest interaction. Given these requirements, the process by which a Bus Driver operates a bus is far different than that of a non-commercial vehicle. Bus Drivers operate on a pre-determined route, without deviation and regardless of whether there are passengers. It is, therefore, the

[13] On May 18, 2018, the Employer filed with the Region a Request to Reopen the Record, as the Employer has expanded the Minnie Van service to Orlando International Airport, which requires RSAs to travel off of Employer property. Should the Region grant the Employer's request, it intends on offering this fact as further evidence that RSAs do not perform the same basic function as bargaining unit employees.

antithesis of an individualized experience. Indeed, the buses are equipped with pre-recorded audio information that plays over the public address system, offering little opportunity to interact directly with guests. Finally, Bus Drivers are limited in their ability to perform guest recovery, providing either trinkets or information about to whom a guest may speak to regarding a concern.

PHHs, who are also included in Addendum A, only perform two job functions: they either direct traffic in the Employer's parking lots, or they operate an open-air tram to transport guests from the parking lots to parks. The Union offered no evidence about the level of guest interaction in the performance of these duties, the training a PHH receives, or a PHH's ability to engage in guest recovery. At best, a PHH has minimal guest interaction and is limited to driving a tram in a parking lot.

For the foregoing reasons, it is plain that RSAs and bargaining unit employees (i.e. Bus Drivers and PHHs) do not perform the same basic tasks. Even the driving duties are not the same. To say that a commercial bus driver performs the same driving functions as an on-demand, personalized guide who drives a car, borders on the absurd. Had he followed Board precedent, the Regional Director would have declined to apply *Premcor* and, instead, would have utilized the Board's accretion analysis. In failing to do so, the Regional Director plainly erred.

C. The Regional Director Should Have Applied the Accretion Standard, Which Would Have Resulted in a Different Decision

1. The Board Applies a Restrictive Accretion Standard

The Board defines the doctrine of accretion as "the addition of a relatively small group of employees to an existing unit where these additional employees share a sufficient community of interest with the unit employees and have no separate identity." *Safety Carrier, Inc.*, 306 NLRB, 960, 969 (1992). Given that "[w]hen the Board finds an accretion, it adds employees to an existing bargaining unit without conducting a representation election," accretion is "in tension with the

employees' [statutory] right to freely choose a bargaining representative, and therefore must be the exception, not the rule." *Coastal Intl'l Sec., Inc.*, 2017 NLRB Reg. Dir. Dec. LEXIS 52, *10 (2017) (internal citations and quotations omitted). The Board applies a "restrictive standard," and will find a valid accretion "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." *Id.* (quoting *NV Energy*, 2015 NLRB LEXIS 50, *15 (2015)). "[T]he party favoring accretion bears a 'heavy' burden of establishing that accretion is appropriate." *Id.*[14]

To determine whether the Union has met this "restrictive standard," the Board examines "many of the same factors relevant to unit determinations in [the] initial representation context": integration of operations, centralization of management and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, degree of separate daily supervision, and degree of employee interchange. *Id.* (quoting *Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005)).

Additionally, "the Board considers whether the employees sought are organized into a separate department; have distinct training; perform distinct work, including inquiry into the amount and type of overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms of employment; and are separately supervised." *United Ops., Inc.*, 338 NLRB 123 (2002). The Board has determined in the accretion context, however, "the two

[14] Indeed, as explained by the Hearing Officer, "when a unit sought is not presumptively appropriate, the burden is on the Petitioner to present specific, detailed evidence in support of its position. General conclusory statements by witnesses will not be sufficient." (Tr. 18:7-11.)

most important factors - - indeed, the two factors that have been identified as critical to an accretion finding - - are employee interchange and common day-to-day supervision." *Frontier Tel. of Rochester, Inc.* 344 NLRB at 1271. Common day-to-day supervision "is particularly significant, since the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another location." *Towne Ford Sales & Town Imps.*, 270 NLRB 311, 312 (1984). Thus, "the absence of these two factors will ordinarily defeat a claim of lawful accretion." *Frontier Tel. of Rochester, Inc.*, 344 NLRB at 1271 n. 7.

2. RSAs Cannot Be Validly Accreted as They Do Not Share an Overwhelming Community of Interest.

The Regional Director did not apply the Board's accretion factors. Had he done so, it would have been readily apparent that the Union failed to satisfy its burden and that accretion is not appropriate. According to Walt Howard, Union Business Agent, RSAs are appropriate for accretion because "they are performing the same type of work that we currently do," which is "transporting guests from the resorts to the parks and back." (Tr. 153:2-9.) The Union's conclusory and simplistic argument ignores the Board's accretion factors and has the practical effect of re-writing the Contract's recognition article to add "all positions that in any way transport guests." Upon examination of the Board's accretion factors, it is clear that RSAs and Bus Drivers and PHHs share no community of interest.

a. <u>The Union Failed to Establish "Critical" Accretion Factors</u>

At the outset, the Union's failure to establish employee interchange or common day-to-day management of these job classifications is fatal to the Petition. It is undisputed that RSAs are not interchanged or cross-utilized with any other job classification within the Employer, including Bus Drivers and PHHs. (Tr. 71:10-16, 135:7-10, 164:25, 165:1-4, 168:13-22.) This conclusion is

further buttressed by the exclusive training received by RSAs. (Tr. 163:25, 164:1-4.) RSAs undergo two weeks of training specifically tailored to the position itself, focused on educating the RSA about the Employer and maximizing the guest experience through various training techniques, including role-play. (Tr. 53:20-25, 54:1-25, 55:1, 97:2-3.) As neither Bus Drivers nor PHHs undergo this training, they are not qualified to work as an RSA, which means they cannot be interchanged. Indeed, an RSA is not able to work a Bus Driver shift, and a Bus Driver is not able to work an RSA shift. (Tr. 71:10-16.) Accordingly, the Union cannot demonstrate that the Employer utilizes RSAs as a Bus Driver or PHH, or *vice versa*, and, therefore, failed to establish employee interchange. *See Racetrack Food Servs. Inc*, 2007 NLRB GCM LEXIS 39, *11 (Nov. 26, 2007) (holding that "[t]he absence of any employee interchange indicates that accretion here is inappropriate.").

Similarly, it is undisputed that RSAs do not share day-to-day management with Bus Drivers or PHHs. Each of these job classifications are contained within different departments in the Transportation Division. (Tr. 47:12-21, 134:25, 135:1-4.) These departments all tier up to Jason Kirk, Vice President, Transportation Operations. (Tr. 47:2-11, 134:12-18.) Within the Minnie Van Department, RSAs are managed by Minnie Van Guest Experience Managers ("GEMs"), who in turn report to David Greenbaum, Project Service Manager. (Tr. 47:2-15). Mr. Greenbaum reports to Andy Wilson, Manager of Transportation Operations Support. *Id.* Bus Drivers, on the other hand, are managed by a different set of GEMs, who report to various managers, who report to Trevor Ocock, Director of Transportation Operations. (Tr. 47:16-25, 48:1-5.) Like the Bus Drivers, PHHs have their own chain of command. (Tr. 47:2-11, 22-25, 48:1-5, 134:1-16.) Accordingly, the only common manager shared between RSAs, Bus Drivers, and PHHs is at a senior executive level, separated by at least three layers of management. (Tr. 169:5-25, 170:1-25, 171:1-2.) This is hardly sufficient to establish common day-to-day management. *Alterative Cmty. Living, Inc.*, 2013

NLRB Reg. Dir. Dec. LEXIS 8, *9-12 (2013) (finding accretion inappropriate where two entities shared common executive director, but day-to-day supervision of employees is entirely separate), *Palo*, 2016 NLRB Reg. Dir. Dec. LEXIS at *26 (finding that where divisions in which employees work share common oversight only at the very highest level, this factor strongly favors that accretion is not appropriate) (internal citations omitted). As the Union has failed to demonstrate these critical accretion factors (i.e. employee interchange and common day-to-day management), the Regional Director would have ended his accretion analysis and dismissed the Petition. *See E.I. Du Pont de Nemours, Inc.*, 341 NLRB 607, 609 (2004) (holding that failure to establish common day-to-day management "clearly favors finding that accretion is not appropriate"); *Racetrack*, 2007 NLRB GCM LEXIS at 11 (holding that "separate day-to-day supervision also indicates that an accretion here is inappropriate.").

b. The Union Failed to Establish Any Other Accretion Factor

Had the Regional Director determined further analysis was necessary, however, the evidence demonstrated that the Union cannot establish that RSAs and Bus Drivers/PHHs share a community of interest and that RSAs have no separate identity. Indeed, the Union cannot establish a single accretion factor. The Employer will address each such factor in the order in which they are listed *supra*.

- **Integration of Operations**

As set forth thoroughly *supra*, RSAs exist within a separate department and are not interchanged with any other job classification. (Tr. 47:12-21, 134:25, 71:10-16, 135:1-4, 135:7-10, 164:25, 165:1-4, 168:13-22.) RSAs and Bus Drivers/PHHs also have different reporting structures and day-to-day managers, as explained *supra*. RSAs and Bus Drivers/PHHs are based out of separate locations. (Tr. 69:17-25, 70:1-3, 132:23-24.) Further, the job duties for these job classifications are separate and distinct. (*Compare* Co.

Ex. 9 *with* Co. Ex. 13.) The only arguable interaction that RSAs have with Bus Drivers is that RSAs, in some locations, may drop guests off in the load/unload zones. (Tr. 150:17-25, 151:1-7.) But, there is no real interaction there, because there is no "guest handoff" process between an RSA and a Bus Driver. The Union did not present any evidence that these positions are functionally integrated. Accordingly, this factor must militate against accretion.

- **Centralization of Management and Administrative Control**

As set forth thoroughly *supra*, RSAs are separately managed from Bus Drivers/PHHs. RSAs are managed by three supervisors, who in turn report to Mr. Greenbaum, who in turn reports to Mr. Wilson, who reports to Mr. Kirk. (Tr. 169:5-25, 170:1-25, 171:1-2.) Mr. Kirk is the only common manager between RSAs and Bus Drivers/PHHs. (Tr. 47:2-11, 22-25, 48:1-5, 134:1-16.) Given that several layers of management separate these job classifications from Mr. Kirk, the Union cannot demonstrate that these positions are centrally managed and controlled. Indeed, the Union offered no evidence on this factor other than the aforementioned reporting structure. Accordingly, this factor must militate against accretion.

- **Geographic Proximity**

RSAs do not share a common workspace with Bus Drivers, as RSAs have a trailer in Disney Springs while Bus Drivers report to assigned bus hubs across the Employer's property. (Tr. 69:17-25, 70:1-3.) Additionally, since PHHs operate in the parking lots of the Employer's theme parks, it is evident that RSAs do not share a common workspace with this job classification, either. (Tr. 130:5-12.) When analyzed with the lack of physical contact with RSAs, as well as the Union's lack of evidence, this factor must militate against accretion.

- **Similarity of Working Conditions**

RSAs drive minivans and sport-utility vehicles and provide on-demand individualized transportation while engaging with guests in personalized conversations and using their judgement to determine the most appropriate route. (Tr: 50:9-25, 51:1-24, 53:16-19.) Bus Drivers, who are required to possess a CDL, drive a bus while following a pre-determined route. (Tr. 67:16-25, 68:1-18.) While they have guest contact, the Employer does not hire Bus Drivers to engage guests. *Id.* PHHs may as a part of their overall responsibilities be assigned to drive an open-air vehicle to transport guests from parking lots to parks, but do not regularly interact or speak with guests while driving. (Tr. 130:0-12, 156:19-25, 157:1-8.)[15]

While these positions share one basic working condition (i.e. driving guests on Employer property), the Union has not identified any other similarities between working conditions. Millions of employees "drive" as part of their duties but that does not make their jobs similar. In this case, the evidence shows that the overall nature and mission of the RSA job is entirely different from that of a Bus Driver or PHH. Additionally, these job classifications are visually different, as they each wear different costumes[16] and, of course, operate entirely different types of vehicles. (Tr. 166:23-25, 167:1-25, 168:1-15.) Accordingly, this factor must also militate against accretion.

[15] The Union continuously referred to PHHs that drive guests from parking lots to parks as "tram drivers." (e.g. Tr. 130:5-25, 131:1-2.) There is no such job classification in the Contract and further, those PHHs that drive trams must possess the same qualifications as those PHHs that do not drive trams. (Tr. 154:24-25, 155:1, 156:15-25, 157:1-8.)

[16] The Employer refers to uniforms as "costumes."

- **Skills and Functions**

The Employer has a guest-courtesy requirement for all employees. (Tr. 172:2-19.) This is not unique to bargaining unit employees, and is expected of anyone who works for the Employer. Above and beyond this basic expectation, RSAs are provided exclusive training in guest interaction and storytelling to provide enhanced guest service as a requirement of their role. (Tr. 53:20-25, 54:1-25, 55:1, 163:25, 164:1-4, Co. Ex. 9.) The Employer does not provide RSAs driving training, with the expectation that the RSAs' parents have already done so. (Tr. 53:20-23.) RSAs are only required to have a valid driver's license. (Tr. 52:24-25, 53:1-4.) RSAs are also expected to perform guest recovery (i.e. rectifying negative guest experience) without the oversight or authorization from a manager. (Tr. 52: 4-23, 113: 20-25, 114:1-23.) RSAs' personality is also important, as they are as much a part of the experience as the ride itself. (Tr. 171:4-18.)

On the other hand, Bus Drivers are required to maintain a CDL, as well as go through the Employer's CDL-certification process and complete fourteen weeks of training. (Tr. 68:11-18, Co. Ex. 13.) Guest recovery is not included in the Bus Driver's job description and their interaction with guests in this capacity is limited to giving out small tchotchkes or instructing the guest on who he/she should contact to address the concern. (Tr. 68:19-25, 69:1-6, 144:9-25, 145:1-14, Co. Ex. 13.) Finally, to the extent a PHH operates a vehicle, the PHH is only required to possess a driver's license and be able to interact with groups of guests. (Tr. 130:13-24.) The Union offered no further evidence of the PHH position.

The RSAs' exclusive training is indicative that this position requires different skills and functions than a Bus Driver/PHH. Indeed, RSAs are required to provide individualized guest interaction, engagement, and service while transporting guests to a destination of

their choosing, while Bus Drivers are required to operate a bus safely and efficiently to a pre-determined destination. (Tr. 67:16-25, 68:1-10, 69:7-16, 171:4-18, 172:8-19.) Accordingly, this factor must militate against accretion.

- **Common Control of Labor Relations**

RSAs utilize the reporting structure explained *supra*. Christie Sutherland, in her capacity as Director of Labor Relations, was only consulted about the Minnie Van pilot program to determine whether the Employer had similar positions. (Tr. 82:21-25, 83:1-3.) Bus Drivers and PHHs are covered by the Contract, which is administered by the Employer's Labor Relations department. (Tr. 20:20-25, 21:1-6, Co. Exs. 7, 8.) Accordingly, the Union failed to demonstrate that the Employer's Labor Relations department has any control over the RSA pilot program akin to that of Bus Drivers and PHHs and this factor must militate against accretion.

- **Collective-Bargaining History**

It is undisputed that RSAs are not included within Addendum A to the Contract, nor did the Employer engage the Union in negotiations about RSAs. (Tr. 82:1-6, Co. Exs. 7, 8.) Furthermore, the Union did not present any evidence that the Employer is contractually obligated to engage the Union in negotiations over newly-created job classifications. *See supra* fn. 5. As testified by Ms. Sutherland, the Employer makes a determination as to whether a new job classification is within the jurisdiction of the Contract. (Tr. 42:1-8.) If it is, the Employer is then instructed by the STCU President as to which affiliate would represent the position. (Tr. 43: 5-18.) If the affiliate-union agrees with the Employer, the job classification is added to the bargaining unit. (Tr. 44:5-9.) Finally, as more fully detailed below, the RSA position is akin to several other job classifications that are not included in this bargaining unit: VIP Tour Guides, Golden Oak

Transportation Services Associate, and the Disney Vacation Club Services Associate. (Tr. 55:2-6, 56:12-25, 57:1-23, 58:1-3 60:8-25, 61:25, 64:13-25, 65:1-25, 66:2-5, Co. Exs. 10, 11, 12.) Accordingly, this factor must militate against accretion.

- **Degree of Separate Daily Supervision**

As detailed above, the RSAs and Bus Drivers/PHHs do not share any daily supervision. In fact, there are at least three levels of management that separate these job classifications from a common senior executive-level manager. Accordingly, this factor must militate against accretion.

- **Employee Interchange**

As explained above, there is no interchange between RSAs and Bus Drivers/PHHs. Accordingly, this factor must militate against accretion.

- **Organization**

As explained above, RSAs are organized in a separate department from Bus Drivers/PHH and report to different managers. There are at least three levels of management that separate these job classifications from a common executive-level manager. Accordingly, this factor must militate against accretion.

- **Training**

As explained above, RSAs undergo exclusive training not available to any other Cast Member, including Bus Drivers and PHHs. Additionally, Bus Drivers' training includes a licensure requirement that RSAs do not have. Accordingly, the Union has failed to demonstrate that RSAs undergo similar training to Bus Drivers/PHHs and this factor must militate against accretion.

- **Type of Work Performed**

This is the sole factor upon which the Union relies for accretion. In the words of Mr. Howard, accretion is appropriate "[b]ecause [RSAs] are performing the same work that we currently do. They are transporting the guests from the resorts to the parks and back." (Tr. 153:3-9.) While the Employer acknowledges that if the Board stripped away all other job duties, equipment, context, training, skills, and job function, RSAs transport guests on Employer property. This is simply not enough, however, to demonstrate similarity of the type of work being performed. Indeed, RSAs undergo two weeks of exclusive training to learn how to engage in high-level guest interaction. (Tr. 53:20-25, 54:1-25, 55:1, 163:25, 164:1-4, Co. Ex. 9.) If an RSA merely drove the vehicle with no proactive guest interaction, that individual's performance would be managed to correct his/her job performance, as the aforementioned interaction is integral to the job classification. (Tr. 171:4-15.) Guests are paying for this individualized service. (Tr. 51:15-25.) A trip with an RSA costs $20.00. *Id.* There is no evidence that a bus ride has any associated cost. As thoroughly explained *supra*, RSAs are also expected to engage in guest recovery. RSAs also drive minivans and sport-utility vehicles in the performance of their duties. (Tr. 51:10-11.) Finally, RSAs perform these duties on-demand and are at the guest's command for the duration of the trip. (Tr. 53:5-19, 101:16-17.)

On the other hand, Bus Drivers are required to maintain a CDL, as well as go through the Employer's CDL-certification process. (Tr. 67:16-25, 68:11-18, Co. Ex. 13.) Furthermore, Bus Drivers are required to complete fourteen weeks of training. (Co. Ex. 13.) Like PHHs, Bus Drivers are engaged in mass transportation of guests, not individualized experiences like RSAs provide. Guest recovery is not included in the Bus Driver's job description and their interaction with guests in this capacity is limited to giving

out small tchotchkes or instructing the guest on who he/she should contact to address the concern. (Tr. 68:19-25, 69:1-6, 144:9-25, 145:1-14, Co. Ex. 13.) Finally, to the extent a PHH operates a vehicle, the PHH is only required to possess a driver's license and be able to interact with guests. (Tr. 130:13-24.) The Union offered no further evidence of the PHH position.

The RSAs' exclusive training is indicative that this position requires different skills and functions than a Bus Driver/PHH. Indeed, RSAs are required to provide guest interaction and engagement while transporting them to a destination of their choosing while Bus Drivers are required to operate a bus safely and efficiently to a pre-determined destination with no stops along the way at the whim of a guest.

Further highlighting the fallacy of the Union's argument are those job classifications at the Employer which share more similarities to the RSAs and are <u>not</u> represented by the Union. These include VIP Tour Guides, Golden Oak Transportation Services Associate, and the Disney Vacation Club Services Associate. (Tr. 55:2-6, 56:12-25, 57:1-23, 58:1-3, 60:8-25, 61:25, 64:13-25, 65:1-25, 66:2-5, Co. Exs. 10, 11, 12.) Each of these job classifications emphasize one-on-one, high-level guest service with a driving function. *Id.* Despite the Union's stated position that transporting guests on Employer property is the Union's work, the Union has never filed a petition seeking to represent or accrete these job classifications. Indeed, RSAs far more resemble these non-represented positions than they do Bus Drivers or PHHs. (*Compare* Co. Ex. 9 *with* Co. Exs. 10, 11, 12 *with* Co. Ex. 13.) Accordingly, this factor must militate against accretion.

- **Frequency of Contact**

When asked by counsel, Mr. Howard explained that the only interaction that RSAs have with Bus Drivers is that RSAs may drop guests off in the bus load zones. (Tr. 150:17-

25, 1-7.) Essentially, these job classifications may observe one another in the performance of their job duties at unknown times. Tellingly, the Union proffered no evidence about any other interaction or overlap between these job classifications. Merely observing another in the performance of his/her job duties is hardly the frequency of contact which the Board requires for accretion. *See NV Energy, Inc.*, 2015 NLRB LEXIS at *20 (finding that "incidental and irregular physical contact does not support accretion"). Indeed, the mere observation of another's job duties were enough to satisfy this requirement would render this requirement superfluous. Additionally, the Union proffered no evidence of any sort of "guest handoff" process, whereby RSAs and Bus Drivers exchange guests, or that guests utilize the Minnie Van service to travel to a bus stop. This contravenes the point-to-point function of the service an RSA provides. (*See* Tr. 50:19-25, 51:1-21.) Accordingly, the Union has failed to demonstrate that RSAs and Bus Drivers engage in frequent contact and this factor must militate against accretion.

- **Terms of Employment**

RSAs are on a six-month temporary assignment, meaning that it concludes at the end of this period, unless extended. (Tr. 48:19-25, 49:1-15.) There is no evidence of bargaining unit employees who work this type of temporary assignment. RSA applicants must submit an application through the Employer's intranet, but are not "skill coded" as with bargaining unit positions.[17] (Tr. 94:4-20.) Unlike Bus Drivers that can be hired from outside of the Employer, RSAs must have one year of experience with the Employer so as to be intimately familiar with the property and its many offerings. (Tr. 99:13-23, 100:16-

[17] Bargaining unit employees must be "skill coded" for the position in which they work. (Tr. 94:9-17.) If a Cast Member has a skill code for a position, it means that the Cast Member meets the qualifications for that position. *Id.*

18, Co. Exs. 9, 13.) Additionally, RSA applicants must be interviewed and selected by local operations after being interviewed by Casting.[18] (Tr. 94:21-25, 97:8-17.) There is no such requirement for bus drivers. (Co. Ex. 13.) RSAs undergo two weeks of exclusive training, available only to RSAs. (Tr. 164:25, 165:1-4.) RSAs are a paid on a range from approximately $13.00 per hour to $21.00 per hour and, unlike bargaining unit employees, are eligible for pay raises that are merit-based. (Tr. 89:11-24, 90:17-23.)[19] RSAs must have a valid driver's license, and a clear driving record, but are not required to have a CDL like Bus Drivers. (Tr. 52:24-25, 53:1-4.) Unlike bargaining unit employees, there is no attendance policy or accident policy applicable to RSAs. (Tr. 92:16-22, 98:12-22.) Unlike bargaining unit employees, RSAs are scheduled based upon guest demand, and must have full flexibility to meet guest needs. (Tr. 53:5-15, Co. Ex. 9.) RSAs are subject to the Employer's employee policy manual, which applies to all employees, except as changed for individuals covered by a collective bargaining unit. (Tr. 92:1-8.) RSAs wear a different costume than Bus Drivers/PHHs. (Tr. 166:23-25, 167:1-25, 168:1-15.) RSAs' breaks and meal periods are governed by the Fair Labor Standards Act, not a collective bargaining agreement. (Tr. 168:16-25, 169:1-4.) It is integral to RSAs to engage in high-level guest interaction, and will be performance-managed if they fail to do so. (Tr. 171:4-15.) Accordingly, this factor must militate against accretion.

While it is evident that the Board will afford certain factors with more or less weight than others, the Union has not demonstrated by specific detailed evidence that it can satisfy any of the aforementioned factors. Indeed, the Union's evidence consisted of the following: (1) the self-

[18] The Employer refers to the recruiting department as "Casting."

[19] On May 18, 2018, the Employer filed with the Region a Request to Reopen the Record. While RSAs were paid at a specified hourly rate, they had the ability to accept an unprompted gratuity from a guest. Recently, the Employer reclassified RSAs to a "tipped" position. This evidence provides another difference from bargaining unit employees.

serving testimony of a Union Business Agent who had no personal experience working within the job classifications about which he testified; and (2) four Employer postings regarding the RSAs and Minnie Van program. The Union has simply failed to satisfy its heavy burden to establish that accretion is appropriate. Application of the accretion factors, therefore, demonstrate that RSAs do not share an overwhelming community of interest with bargaining unit employees. Accordingly, if the Regional Director had applied the accretion factors, he would have reached a different result.

D. The Regional Director's Decision Disenfranchises the RSAs

"The Board has followed a restrictive policy in finding accretion because it forecloses the employees' basic right to select their bargaining representative." *Towne Ford Sales & Town Imps.*, 270 NLRB at 311. The Board "will not, under the guise of accretion, compel a group of employees, who may constitute a separate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them." *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969).

The Regional Director's decision to disregard established Board precedent and eschew an accretion analysis has resulted in the precise scenario the Board has sought to avoid. Allowing this flawed decision to stand without further review will deprive RSAs of their freedoms of association and self-determination to choose whether they desire a bargaining representative at all. Instead, the Regional Director has forced RSAs to join the Union without any evidentiary support, other than RSAs and bargaining unit employees operate vehicles to transport guests on the Employer's property. This is simply not enough to justify disenfranchising 74 RSAs and eventually many more. Furthermore, permitting the Regional Director's decision to stand will open the proverbial floodgates to allow bargaining representatives to file unit accretion petitions. Indeed, if the only qualification for accretion is sharing an extremely basic work function (driving), the Board will

likely be inundated with these petitions as the Regional Director's decision converts a "restrictive" policy into one of all-out inclusion.

IV. CONCLUSION

The Regional Director's decision to (1) not apply the plain, unambiguous terms of the Parties' Contract, (2) apply the *Premcor* doctrine, (3) dispense with an accretion analysis, and (4) disenfranchise RSAs raises substantial questions of law and policy and reflects a significant departure from established Board precedent. The Employer requests that the Board take review of the Regional Director's decision.

Dated this 22nd day of May, 2018

Respectfully submitted,

By: /s/ Andrew S. Hament

Andrew S. Hament
Florida Bar No. 325279
Email: ahament@fordharrison.com
Aaron L. Zandy
Florida Bar No. 0125271
Email: azandy@fordharrison.com
Bret C. Yaw
Florida Bar No. 0100445
Email: byaw@fordharrison.com

FORD & HARRISON LLP
300 South Orange Avenue, Suite 1300
Orlando, FL 32801
(407) 418-2300 Telephone
(407) 418-2327 Facsimile

Attorneys for Walt Disney Parks & Resorts U.S.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May, 2018, a true and correct copy of the foregoing was electronically filed with the National Labor Relations Board using its Agency website; and a copy was served on Thomas J. Pilacek via e-mail (tpilacek@pilacek.com).

/s/ Andrew S. Hament
Andrew S. Hament

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